No. _____

19-6144

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Tom Smith III
(Your Name)

PETITIONER

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Tom Smith III
(Your Name)

P.O. Box 100
(Address)

Milan, Michigan 48160
(City, State, Zip Code)

219-690-2499
(Phone Number)

QUESTION(S) PRESENTED

I. Whether the Sentencing Commission via commentary exceeded its statutory mandate under § 994(h) by including/aiding and abetting, conspiracy, and attempt crimes to commit a controlled substance offense under § 4B1.2(b) and to qualify a defendant as a career offender § 4B1.1.

II. Whether a statute with alternative elements is considered to be divisible, even though it comprises elements that play a role in a defendant conviction, and those same elements have a "definitional portion" under another statute that lists alternative means in its disjunctive.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[✓] reported at 921 F.3d 708; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 04-22-19.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 06-04-19, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE FACTS

In 2017, Mr. Smith was indicted on six federal charges that consist of one count of possessing with intent to distribute a detectable amount of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(c), two counts of possession of a firearm by a prohibited person, in violation of 18 U.S.C. § 922(g)(1), and three counts of distribution of a detectable amount of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(c). Doc. 12. Mr. Smith entered into a plea agreement that contained a limited waiver of Appellant's right to appeal the career offender determination if the Court determined that defendant is a career offender. Doc. 74. He was sentenced to 188 months of imprisonment as a career offender. Doc. 56. Absent the career offender enhancement he would have been sentenced in the range of 37-46 months.

Following the District Court Mr. Smith, had his sentence affirmed by the Court of Appeals for the Seventh Circuit. He then filed timely for reconsideration for panel rehearing and he was denied. Both remedies were used to challenge the career offender enhancement, and after these remedies both were denied and this petition followed.

REASONS FOR THE PETITION GRANTED

I. Whether the Sentencing Commission via commentary exceed its statutory mandate under § 994(h) by including/aiding and abetting, conspiracy, and attempt crimes to commit a controlled substance offense under § 4B1.2(b) and to qualify a defendant as a career offender § 4B1.1.

U.S. Sentencing Guidelines Manual § 4B1.1 provides that a defendant is a career offender if he was at least eighteen years old at the time he committed the instant offense of conviction; the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and the defendant has at least two prior felony convictions for either a crime of violence or a controlled substance offense. U.S. Sentencing Guidelines Manual § 4B1.2(b).

An offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or disperse.

U.S. Sentencing Guidelines Manual § 4B1.2(b) application note 1/ commentary further provides that controlled substance offenses include "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

Subsections (h)(1)(A), (h)(1)(B), (h)(2)(A) and (h)(2)(B) of 28 U.S.C.S. § 994 provide that the U.S. Sentencing Commission shall assure that the guidelines specify a sentence to a term of imprisonment "at or near the maximum term authorized" for categories of defendants in whcih the defendant is eighteen years old or older and has been convicted of a felont that is a crime of violence; or an offense described in section 401 of the Controlled Substance Act (21 U.S.C. § 841), sections 1002(a), 1005, and 1009 of the

Controlled Substances Import and Export Act (21 U.S.C. § 952(a), 955, and 959), and chapter 705 of title 46 [46 U.S.C.S. §§ 70501].

A. Disagreements across Circuits concerning 28 U.S.C. § 994(h) and 28 U.S.C. § 994(a)

On April 23, 1993, U.S. V. Price, 990 F.2d 1367 (D.C. Cir.) surfaced which was the first Court to address the Guidelines's inclusion of conspiracy as a predicate offense. Before Price, no court had been presented with the question of whether the discrepancy between 28 U.S.C. § 994(h) and the commentary to section 4B1.1 and 4B1.2(b) of the Guidelines undermined the Commission's authority to act as it did. As a result, this decision immediately initiated several disagreements within the lowers courts across circuit on what constitutes a controlled substance offense. Some circuits and dissenting judges agree with the Price decision and others rejected the Price decision. See, U.S. v. Bellazerius, 24 F.3d 678, 700-02 (5th Cir); U.S. v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1994); U.S. v. Piper, 35 F.3d 611, 618 (1st Cir. 1994) and U.S. v. Dammerville, 27 F.3d 254 (7th Cir. Feb. 8, 1994).

Moreover, in up-to-date and current court proceedings those disagreements of whether the U.S. Sentencing Commission had the authority to include conspiracy in the definition of a controlled substance offense under 4B1.2(b) is still a hot issue in today's time within the lower courts across circuits. See, U.S. v. Havis, No. 17-5772 (6th Cir. June 2019)(en banc) and U.S. v. Winstead, 890 F.3d 1082 (D.C. Circuit May 25, 2018). Although these courts address a different portion of the Sentencing Commission's commentary under § 4B1.2(b) they still capture and address the underlying argument of the disagreements stemmed from a differing in opinion on whether the Sentencing Commission relied on its congressional statutory mandate under 28 U.S.C. § 994(h) as its sole authority to adopt Guidelines section 4B1.1 and 4B1.2(b),

or whether it relied on its broader congressional statutory authority under 28 U.S.C. § 994(a) in conjunction with 28 U.S.C. § 994(h) to adopt the career offender guidelines and the definition of a controlled substance offense under §§ 4B1.1 and 4B1.2(b). The Seventh Circuit and a few other circuits have concluded that the Sentencing Commission's reliance on § 994(a) as its broader authority to implement such recidivist guidelines is completely and legitimately an exercise of its rightful powers. However, legislative history shows that in a 1993 amendment to Congress the Commission broadened its statement of authority for the inclusion of conspiracy offenses to encompass 28 U.S.C. § 994(a)-(f), as well as 28 U.S.C. § 994(h). Then in 1995 the Sentencing Commission submitted to Congress "a nearly identical amendment to the background commentary to section 4B1.1. See, 60 Fed. Reg. 25074, 25086-87 (1995). In this 1995 amendment proposal, the Sentencing Commission sought to expand its original career offender mandate under § 994(h) so it could reach its broader authority under § 994(a) for career offender ehancement purposes. Therefore, "if there is any doubt that the Commission was relying on section 994(h) as its authority for the inclusion of conspiracy in the enumeration of offenses, such doubt is swept away by the Commission's more recent efforts to extend the statutory basis to section 994(a)." See, United States v. Mendoza-Figueroa, 65 F.3d 691 (Dec. 6, 1994 8th Cir.). The Sentencing Commission's Report to the Congress: Career Offender Sentencing Enhancements 2016 is also a testament to the Commission's reliance on § 994(h) as its sole authority for the implementation of the career offender guideline instead of § 994(a).

Nevertheless, the U.S.S.G. states ("The guidelines and policy statements promulgated by the Commission are issued pursuant to section 994(a) of Title 28 United States Code.") but it did not include the Commission's commentary as part of that equation. Stinson v. U.S. states that commentary is a result

of an agency's own interpretation of a legislative's rule making. In other words, if commentary does more than to interpret or explain the plain language of an ambiguous or unambiguous guideline then it simply cannot be used. Also, if 4B1.2(b)'s commentary is part of mandate 28 U.S.C. § 994(h) then why is it not included in the guideline of § 4B1.2(b)? The Commission cannot use commentary to add crimes to the guidelines. See Havis, No. 17-5772, application notes are to be "interpretations of, not additions to, the Guidelines themselves."

B. Not limited to a conspiracy crime

A particular part of 4B1.2(b)'s commentary has created several disagreements within the lower courts across circuits, but specifically speaking, the disagreements among these circuits consist of whether a conspiracy crime that was added to the guidelines of 4B1.2(b) through the Sentencing Commission's commentary was permitted or prohibited.

However, the issue being presented in this Court is not limited to a conspiracy crime, instead it includes the entire application note that is attached to § 4B1.2(b) of the guidelines. By examining this particular and broader issue concerning the entire application note with regards to the Sentencing Commission's duties, this Court will see that all defendants that do not fall within the plain language of a controlled substance offense, but fall within the ambit of 4B1.2(b)'s guideline will be enormously affected. But before the massive impact of sentencing is mentioned about defendants being sentenced to long lengths of time with no grounding in the guidelines themselves, Mr. Smith, will provide a brief overview from an opinion out of the Sixth Circuit about the basic functioning of the Commission's affairs and then elaborate on it.

C. Role of the Sentencing Commission

In U.S. v. Havis, there is a section in the opinion that is dedicated to the role of the Sentencing Commission and it states:

> "To decide which construction of § 4B1,2(b) prevails, we begin with the Sentencing Commission and its role in our constutional system. Congress created the Commission as an independent body "charged [] with the task of establish[ing] sentencing policies and practices for the Federal criminal justice system." Stinson v. United States, 508 U.S. 36, 40-41, 113, S.Ct. 1913, 123 L.Ed. 2d 598 (1993)(citation and internal quotation marks omitted). The Commission fulfills its purpose by issuing the Guidelines, which provide direction to judges about the type and length of sentences to impose in a give case. Id. at 41. Although judges have some discretion to deviate from the Guidelines' recommendations, our procedural rules "nevertheless impose a series of requirements on sentencing courts that cabin the exercise of that discretion." Peugh v. United States, 569 U.S. 530, 543, 133 S.Ct. 2072, 186 L.Ed. 2d 84(2013). A judge cannot stray from a defendant's Guidelines range, for example, without first giving an adequate explanation of the variance. See Id. The Commission thus exercises a sizeable piece "of [2019 U.S. App. LEXIS 6] the ultimate governmental power, short of capital punishment" - the power to take away someone's liberty. United States v. Winstead, 890 F. 3d 1082, 1092 (D.C. Cir. 2018)(citation omitted).
>
> That power is ordinarily left to two branches of government - first to the legislature, which creates a range of statutory penalties for each federal crime, and then to judges, who sentence defendants within the statutory framework. But the Commission falls squarely in neither the legislative nor the judicial branch; rather, it is "an unusual hybrid in structure and authority," entailing elements of both quasi-legislative and quasi-judicial power. Mistretta v. United States, 488 U.S. 361, 412, 109 S.Ct. 647, 102 L.Ed. 2d 714 (1989). In Mistretta, the Supreme Court explained how the Commission functions in this dual role without disrupting the balance of authority in our constitutional structure. Although the Commission is nominally a part of the judicial branch, it remains "full accountable to Congress," which reviews each guideline before it takes effect. Id. at 393-94; see also 28 U.S.C. § 994(p). The rulemaking of the Commission, moreover, "is subject to the notice and comment requirements of the Administrative Procedure Act." Id. at 394; see also 28 U.S.C. § 994(x). These two constraints - congressional review and notice and comment - stand to safeguard the Commission from uniting legislative [2019 U.S. App. LEXIS 7] and judicial authority in violation of the separation of powers.
>
> Unlike the Guidelines themselves, however, commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment. This is also not a problem, the Supreme Corut tells us, because commentary has no independent legal force - it serves only to interpret the Guidelines' text, not to replace or modify it. See Stinson, 508 U.S. at 44-46; see also United States v. Rollins, 836 F.3d 737, 742 (7th Cir. 2016)(en banc) ("[T]he application notes are interpretations of, not additions to, the Guidelines themselves..."). Commentary binds courts only "if the guideline which the commentary interprets will bear the

construction." Stinson, 508 U.S. at 46. Thus, we need not accept an interpretation that is "plainly erroneous or inconsistent with the" corresponding guideline. Id. at 45 (citation omitted)."

Nevertheless, as mentioned above, the Sixth Circuit clearly has indicated that the Sentencing Commission fulfills its purpose by issuing the Guidelines, which provide direction to judges about the type and length of sentences to impose in a given case." However, the Commission is subject to oversight and that's why it remains "fully accountable to Congress." Therefore, if the Commission would like to make aiding and abetting, conspiring, and attempt crimes a part of § 4B1.2(b), then it must submit amendment proposals to Congress for congressional review. This cannot be done by using commentary as a means to add crimes to the guidelines because application notes are to be "interpretations of, not additions to, the Guidelines themselves." See, U.S. v. Rollins, 836 F.3d at 742. "If that were not so, the institutional constraints that make the Guidelines constitutional in the first place - congressional review and notice and comment - would lose their meaning." See, U.S. v. Havis.

D. The major impact that 4B1.2(b)'s commentary have on Mr. Smith and other defendants similarly situated

With respect to a federal administrative agency's construction of a federal statute that the agency administers, if a statute is unambiguous, the statute governs; if, however, Congress' silence of ambiguity has left a gap for the agency to fill, courts must defer to the agency's interpretation, so long as it is a permissible construction of the statute; an agency's legislative rule is the product of delegated authority for rulemaking which must yield to the clear meaning of a statute. See Stinson v. United States 508 U.S. 36, 123 L.Ed. 2d 598, 113 S.Ct. 1913 (May 3, 1993). Section 4B1.2(b) is clearly and completely ambiguous so really there is no real need for Section 4B1.2(b)'s application note to exists. However, and since it does

exist, that is not a problem as long as it does its job because it cannot exist for its own sake. Stinson, in so many words, mentions that commentary purposes is to serve as a means of interpreting or explaining the plain language of a particular guideline and in Mr. Smith's case, the so-called applicable commentary under § 4B1.2(b) is not serving interpretive or explanatory purposes. Instead, it adds offenses that are "not listed in the guideline" of § 4B1.2(b). As a result, Mr. Smith's sentence and countless other defendants' sentences have been extremely affected. See U.S. v. Garcia, U.S. App. LEXIS (March 6, 1995); U.S. v. Garrett, 45 F.3d 1135 (7th Cir. Sep. 13, 1994); U.S. v. Dammerville, 27 F.3d 254 (7th Cir. Feb. 8, 1994); and U.S. v. Bellazerius, U.S. App. LEXIS 23822 (10th Cir. Aug. 31, 1994).

Furthermore, individuals in the Fifth, Sixth, Eighth and D.C. Circuits, who are convicted of the same crime as Mr. Smith, and who have the exact same criminal record, would not receive a career offender enhancement which would create an unwarranted disparity in punishment under § 3553(a). The reason being is because other circuits upheld § 4B1.2(b)'s commentary as being completely authoritative even though the Commission inappropriately expanded the definition of a "controlled substance offense" by relying on § 994(h) which does not include inchoate crimes. So, if an individual is from the Seventh Circuit or an agreeing circuit, then he or she will receive a career offender enhancement based on no grounding in the guideline. This creates an illegal sentence and that sentence would constitute "an incorrect application of the...guidelines." See, Williams v. U.S., 503 U.S. 193, 203, 117 L.Ed. 2d 341, 112 S.Ct. 1112.

Nevertheless, Mr. Smith was convicted under Ind. Code 35-48-4-1's delivery element. However, the delivery element has a definitional portion under Ind. Code 35-48-1-11 that lists alternative means in its disjunctive. It includes "organizing" and "supervising" and those terms of conduct are overbroad in comparison to the generic crimes under 4B1.2(b)'s guideline and its application note. Indiana law defines "delivery" differently from federal law. See, Ind. Code § 35-48-1-11 and 21 U.S.C. § 802(8).

II. Whether a statute with alternative elements is considered to be divisible, even though it comprises elements that play a role in a defendant conviction, and those same elements have a "definitional portion" under another statute that lists alternative means in its disjunctive.

Under Ind. Code Ann. § 35-48-4-1, a defendant is guilty of dealing in cocaine if he "knowingly or intentionally manufactures, finances the manufacture of, delivers, or finances the delivery of cocaine or a narcotic drug, or that he possessed cocaine or a narcotic drug with the intent to take one of those actions."

Under Ind. Code Ann. § 35-48-1-11 "Delivery," delivery means "(1) an actual or contructive transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship; or (2) the organizing or supervising of an activity described in subdivision (1)."

The Seventh Circuit in United States v. Elder, 900 F.3d 491 states:

> "In determining whether a statute is divisible, the court looks first to whether there is a decision by the state supreme court authoritatively construing the relevant statute and establishing which facts are elements and which are means. Absent a controlling state-court decision, the text and structure of the statute itself may provide the answer. Finally, failing these authoritative sources of state law, sentencing courts may look to the record of a prior conviction itself for the limited purpose of distinguishing between elements and means."

The Seventh Circuit in the case above mentioned that after looking through a series of tests with no success of determining whether a statute is divisible, sentencing courts may look to the record of a prior conviction itself for the limited purpose of "distinguishing between elements and means. After this process is completed, and it is discovered that the defendant's statute of conviction is divisible with alternative elements, then the modified categorical approach must be applied. See Shephard v. U.S., 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed. 2d 205 (2005). Under this approach, courts may look beyond the statutory elements and review the documents to find out which crime with what elements played a role in a defendant's conviction. See, U.S. v. Anderson, No. 18-1548 (7th Cir. Mar. 21, 2019). When the elements are found, the prior offense is lined up with the generic offense to see if they make a requisite match or to see if the prior offense is overbroad. If it makes a match with the generic crime, most courts immediately stop their investigation

with the "modified approach" and absent-mindedly let defendants suffer the consequences of having their sentences absurdly enhanced. This is proposterous!

The sentencing courts and the Court of Appeals rarely look to the "definitional portion" of the defendant's elements of conviction to see if a defendant truly qualifies for an enhancement unless a defendant makes the definitional portion claim, which is usually located under another statute that lists alternative means in its disjunctive, the defendant is severely punished. See United States v. Hinkle, 832 F.3d 569, 574 (5th Cir. 2016). Texas statute of delivery was examined all the way down to its "definitional portion" under another statute. Also, See Lopez v. Lynch, 810 F.3d 484 (7th Cir. 2016); U.S. v. Espinoza-Bazaldua, 711 Fed. Appx. 737 (5th Cir. Oct. 16, 2017); and U.S. v. Smith, No. 18-2905 (7th Cir. Mar. 25, 2019). Indiana and Texas statutes have definitional portions that weren't raised in a claim to the Court so it could be considered in the modified approach phase unlike Hinkle. Regardless, every element should be treated equally without prejudice and never limited under the examination process by the modified approach. If the definitional portion is not viewed as an important part of the modified approach, many defendants will suffer from prejudice, lack of protection from the law, and lose their life, liberty and property to sentences that have been massively increased as a resultof the courts that have undermined the modified approach in exchange of only exposing elements that match the generic offense. For example, Mr. Smith's lawyer did not conduct a full investigation in order to make a strategic decision about which element played a role in his conviction under Indiana Statute § 35-48-4-1. Instead, his lawyer just presumed indivisibility without any support from Indiana law or the record of Smith's Indiana conviction. As a result, Smith's attorney incorrectly held that his statute of conviction listed alternative means instead of elements

in the disjunctive and this caused the Court of Appeals and the District Court to overlook the "definitional portion" under Indiana Statute § 35-48-1-11 which is in conjunction with Smith's "delivery" element of conviction under Indiana Statute § 35-48-1-4. Moreover, this "delivery" definition includes "organizing" and "supervising" activities that are broader than guideline under 4B1.2(b) for a controlled substance offense. This prejudiced Smith and his sentence in the Court of Appeals was affirmed.

So, in conclusion, the "definitional portion" should not be excluded from the modified approach or defendants will experience sentencing disparity under the 3553(a) factors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tom Smith III

Date: September 2, 2019